Supreme Court, U.S.
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No. 93-955

IN THE

Supreme Court of the United States

October Term, 1993

JOHN S. BEESON, ET AL.,
Petitioners,

v.

PHILLIPS, KING AND SMITH, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 17, 1994

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QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals erred in affirming the summary judgment, finding Petitioner's state law claim against the Law Firm was time-barred, for the judicially admitted and legally dispositive reason Petitioner's buy-out of several co-investors in Lincoln savings and loan, in an attempt to remedy acting in concert charges, established the accrual of his legal injury under Texas law?

LIST OF PARTIES

1. John S. Beeson, Petitioner;
2. Lynn Foster
3. Phillips, King & Smith, Respondent
4. Phillips, King, Smith & Wright, Inc.
5. Phillips, King, Smith & Wright, P.C.
6. Smith, Wright & Weed, P.C.
7. Charles E. Harrell, Respondent
8. Anthony W. Nims, Respondent
9. Harold L. Levi, Respondent
10. E. Ashley Smith; E. Ashley Smith, P.C., Respondent
11. C. Lee Crawley, Respondent
12. C.L. Crawley, Jr., P.C., Respondent
13. William E. King, Respondent
14. G. Christopher Scruggs, Respondent
15. Robert L. Johnson, III, Respondent
16. Thomas H. Weed, Respondent
17. W. David Blunk, Jr., Respondent
18. First South Savings Association - In Receivership
19. Resolution Trust Corporation, Respondent

Other parties to the Court of Appeals Decision who have no interest in the outcome of this Petition.

1. Robert L. Randolph
2. Bob M. Johnson
3. Mickey D. Altman
4. Dennis R. Ranzau

Pursuant to Rule 29.1, there are no private parent companies or subsidiaries.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Lynn Foster joins John Beeson ("Petitioner") only on the portion of the Court of Appeals' decision involving Respondent RTC. Petitioner Beeson petitions for a writ of certiorari regarding the portion of the Court of Appeals' decision involving Respondents, Phillips, King and Smith, et. al., the "Law Firm." He challenges the Court of Appeals' legal determination that his negligence claim against the Law Firm was time-barred under Texas law.

1. FACTUAL HISTORY. In early 1984, Petitioner, Jerry Holley and Marvin Haas decided to purchase the controlling stock of the Florida institution known as Lincoln Savings & Loan ("Lincoln"). Petitioner contacted the Law Firm, to prepare and file a change of control application with the Federal Home Loan Bank Board ("FHLBB"). After the Law Firm prepared and filed the change of control application, the FHLBB rejected it due to Haas' and Holley's backgrounds. However, the FHLBB allowed Petitioner to go forward with the Lincoln purchase on the condition he sign a supervisory agreement which assured he would be the primary shareholder and that he would not transfer stock ownership to insiders or others who would act in concert to control Lincoln.

After Petitioner signed the supervisory agreement, he located Robert L. Randolph, Bob M. Johnson, Lynn Foster, M. D. Altman, Dennis R. Ranzau and several other individuals ("the Borrowers") to invest in the venture and they arranged to borrow money from First South Savings Association ("First South") to purchase the Lincoln stock. In December 1984, Petitioner informed the Law Firm about the co-investors and the Law Firm prepared and filed a letter with the FHLBB, providing the names of the Lincoln co-investors.

On January 5, 1985, Petitioner and the Borrowers closed the loan and pledged their Lincoln stock to First South as partial collateral. Thereafter, Petitioner and the Borrowers took control of Lincoln, appointed themselves directors and officers and made loans to each other. In the fall of 1985, the FHLBB examined Lincoln.

The examination resulted in the FHLBB questioning Petitioner's arrangements for Lincoln's purchase, citing regulatory violations committed by Lincoln's management

(Petitioner and the Borrowers), probing the existence of Lincoln's financial soundness, and commencing the removal of Petitioner and the Borrowers from Lincoln ownership for, among other things, acting in concert.[1] Ultimately, Lincoln was deemed insolvent, placed in receivership, and its stock allegedly became worthless.

2. PROCEDURAL HISTORY. In January 1989, First South filed a state lawsuit against Petitioner and the Borrowers to collect on the note. The next month, Petitioner and the Borrowers filed their own lawsuit, seeking to cancel the First South notes and alleging the Law Firm's negligence. As to the Law Firm, it was alleged:

> *Due to the Defendants' negligent actions ... in regards to the handling of the change of control of Lincoln ... Plaintiff Beeson was required to purchase the Rizk, et al stock* thus preventing Plaintiffs from raising additional capital to infuse into Lincoln ... due to the owners of Lincoln not being able to furnish

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[1] In 1985, the FHLBB found Petitioner and the Borrowers owned more stock than represented and concluded the higher ownership was due to Petitioner's purchase of 66,666 additional shares, which violated the parties' stock restriction agreement. Subtracting these shares from the Borrowers' percentage stock interests FHLBB agents discovered the Borrowers' percentages exceeded five percent. FHLBB determined Petitioner violated his Supervisory Agreement, mandating FHLBB permission before the Borrowers could invest in Lincoln, and the Borrowers needed to file their own change of control applications. 12 U.S.C. §1730(e)(1). Further, each Borrower was indebted under the First South loan for his 5% ownership interest and for *other* Borrower's loan obligations to the extent of such 5% ownership. Thus, each Borrower owned ten or more percent of Lincoln's stock and was "acting in concert."

> their knowledge and experience and the lack of the right to infuse additional capital, Lincoln was unable to make sound decisions causing Lincoln's stock to eventually become worthless all to Plaintiff's damages ... (emphasis added).

In March 1989, FSLIC became First South's conservator. FSLIC assigned the management of First South to FDIC, which removed both Beeson's and First South's state court cases to federal court in April 1989, and consolidated the actions into Beeson's Civil Action No. 89-1302. Thereafter, on July 12, 1991, RTC took over as receiver and cross-claimed against the Law Firm.

After sufficient time for discovery, the Law Firm moved for a summary judgment. On April 27, 1992, the federal district court signed a summary judgment order which provided that both RTC's and Petitioner's claims against the Law Firm were barred by the statute of limitations.

Petitioner appealed to the United States Fifth Circuit Court of Appeals. On appeal, the Fifth Circuit, on the basis the Texas Supreme Court's 1967 decision in *Atkins v. Crosland*, 417 S.W.2d 150 (Tex. 1967), affirmed the portion of the summary judgment regarding Petitioner's claim against the Law Firm, holding the claim accrued in 1986, when Petitioner incurred expenses in an attempt to remedy FHLBB charges of acting in concert violations, by buying-out various Lincoln shareholders.

A. SUMMARY OF OPPOSITION

This case is not worthy of certiorari. The two-year Texas statute of limitations for legal malpractice claims mandates that an legal injury accrues when an tortious act

causes a risk of harm or damage, no matter how slight. The Court of Appeals properly reviewed Petitioner's pleading, his deposition testimony and the undisputed factual circumstances of the case in determining Petitioner's cause of action was barred by the Texas statute of limitations. In his petition, Petitioner identified his injury, an alleged defectively prepared change of control application, and the first legally significant sign of damage from such injury, his buy-out of several co-investors listed on his change of control application in the attempt to remedy FHLBB acting in concert charges. This was the legal consequence of such facts under the Texas legal injury rule. The Court of Appeals' opinion also confirms the district court's observation that Petitioner was *aware* of the "acting in concert" charge raised by the FHLBB in 1985. But the Court of Appeals determined Petitioner's legal injury accrued a year later, in 1986, thereby giving him more benefit of the doubt than he may have received by a Texas court. Under either scenario, his lawsuit filed in 1989 was barred by the Texas Statute of Limitations.

B. THE DISTRICT COURT'S OPINION

The district court found that Petitioner's cause of action against the Law Firm accrued at least four years prior to the filing of his lawsuit on February 8, 1989. Judge Black observed the undisputed evidence that, in August, 1985, the FHLBB began to investigate Petitioner's purchase of Lincoln and that, by October 25, 1985, Petitioner reviewed a copy of the FHLBB's report which charged him with the commission of various ethical and regulatory violations, including having acted in concert with others to control Lincoln Savings. For instance, in his deposition testimony, Petitioner stated he had:

> physical meetings with these people at their offices at First South and said, 'Hey, these

> people are accusing me of violating a change of control and acting in concert statutes, and this stuff has real serious criminal penalties, and I don't like it at all

Although it was not pled, the district court applied the discovery rule, a mechanism intended to toll the usual running of limitations, to Petitioner's claim. The district court's decision comports with Texas Supreme Court law that, when a person has knowledge of the facts which constitutes his claim, the Texas statute of limitations begins to run. *Sutherland v. Caballero,* 759 S.W.2d 945 (Tex. 1988) (legal injury rule doesn't apply when client previously aware of facts for which he later sues).

C. Fifth Circuit's Opinion

The Fifth Circuit affirmed the summary judgment, but under a different limitations time frame. *Texas Refrigeration Supply, Inc. v. Federal Deposit Ins. Corp.*, 953 F.2d 975, 980 (5th Cir. 1992); *Petroscience Corp. v. Diamond Geophysical, Inc.*, 684 S.W.2d 668, 669 (Tex. 1984) (summary judgment is proper if any ground asserted is valid even though upheld on wrong theory). *See also Sutherland v. Caballero,* 759 S.W.2d at 946 (affirming on different limitations time frame). The Fifth Circuit observed the undisputed fact that, by October 1985, Petitioner Beeson knew the facts constituting his claim. However, applying the 1967 Texas Supreme Court *Atkins* case, the Court determined Petitioner's legal injury accrued when he sustained the monetary loss incurred by his co-investor buy-out. Although the Court of Appeals failed to observe that, twenty-one years after *Atkins*, Texas adopted the discovery rule in legal malpractice cases, in *Willis v. Maverick*, 760 S.W.2d 642, 646 (Tex. 1988), and that, in this instance, the discovery rule triggered the accrual of Petitioner's claim in October 1985,

the Court of Appeals' decision, nonetheless, yielded the same outcome: Petitioner's claim i s time-barred.

REASONS FOR DENYING THE WRIT

A. THIS CASE DOES NOT PRESENT AN ISSUE WORTHY OF CERTIORARI.

1. THIS CASE PRESENTS A LEGAL DETERMINATION ON A FACT SPECIFIC ISSUE.

The accrual of a cause of action is a legal determination made by Texas courts under a variety of different factual settings. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). The general rule in Texas is that a cause of action accrues when facts come into existence which give a claimant a right to sue. *Robinson v. Weaver,* 550 S.W.2d 18 (Tex. 1977). In tort actions, which carry a two year limitations period, it is when "the wrongful act effects an injury regardless of when the claimant learned of such injury." *Id.* at 19. However, there are two exceptions to the rule of accrual: the discovery rule, *Gaddis v. Smith,* 417 S.W.2d 577, 578-79 (Tex. 1967), and the legal injury rule. *Tennessee Gas Transmission Co v. Fromme,* 269 S.W.2d 336, 337 (Tex. 1954) (as cited in *Clade v. Larsen,* 838 S.W.2d 277 (Tex. Ct. App. 1992)).

At issue is the legal injury rule. This rule applies when a party engages in lawful activities that allegedly injure another and, thus, a cause of action is said not to accrue until the claimant sustains some legally actionable harm. *Tennessee Gas,* 269 S.W.2d at 337; *Atkins v. Crosland,* 417 S.W.2d 150,153 (Tex. 1967). The "harm" under which a legal injury accrues is defined as when a plaintiff's legal position to the issue becomes fixed, *regardless of whether damages have yet occurred or have been fully established.*

Atkins, 417 S.W.2d at 153; *Smith v. Knight*, 608 S.W.2d 165 (Tex. 1980). The Court of Appeals articulated the Texas legal injury rule as: (1) the commission of a tortious act, and (2) the suffering of a legal injury. While this definition is not precisely Texas law, the outcome remains the same — Petitioner's claim is time-barred.[2]

2. PETITIONER FAILS TO INVOKE RULE 10 AND SEEKS ONLY TO ARBITRATE A PRIVATE DISPUTE.

Petitioner's challenge has absolutely nothing to do with federal law; he disputes only the result of a state-based negligence claim against other Texas citizens. His dispute with the Court of Appeals' determination, regarding the accrual of his cause of action under Texas law, fails to warrant this Court's discretion or consideration. Although

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[2] *Atkins* was actually a case of first impression involving a federal agency's actions under federal limitations on a two-party lawsuit governed by state limitations. In *Atkins*, four dates could have commenced accrual of a taxpayer's claim: (1) the time of the accountant's negligent conduct; (2) the time the tax was due; (3) the time of the assessment; or (4) the time the assessment was paid. W. Honey, *Limitation Of Actions*, 46 TEX. L. REV. 119, 124 (1967). Had the action accrued at the time of performance or when due, plaintiffs would be forced to sue within *two years* under state law, while IRS has *three years* to assess a deficiency under federal law. Under this scenario, the extent of tax liability is impossible to prove. Because deficiency assessments generally *must* be made within three years of the filing of a tax return, the *Atkins* court held a legal injury accrued upon the deficiency notice. *Limitations of Actions, supra* at 124. *But in reaching its decision, the court expressly stated the statutory policy of preventing stale claims was not violated. Id. (citing Atkins,* 417 S.W.2d at 154). *Atkins* has been redefined as a discovery rule case. *Hoover v. Gregory*, 835 S.W.2d 668, 673 (Tex. Ct. App. 1992).

he cites 28 U.S.C. § 1254(1) as a jurisdictional basis for review, his challenge underscores the reasons for Supreme Court Rule 10.

Rule 10 is the procedural rule promulgated by this court to indicate the character of reasons considered in the grant or denial of a petition for certiorari. J. MOORE, 13 MOORE'S FEDERAL PRACTICE ¶ 810.07 (2d ed. Supp. 1994fr). That rule states:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual court of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the court's power of supervision.

Petitioner's claim involves none of these considerations. Absent is any challenge regarding a conflict among the circuits, a determination of a federal question contrary to a state court of last resort, an *Erie v. Tompkins*

issue[3] or a matter of public importance. Instead, he challenges only the Court of Appeals' perceived failure to adopt his view of Texas law. Although he casts his petition to this Court as involving an evidentiary burden issue, in reality, he seeks the application of his subjective view of Texas' limitations law. On page 15 of his brief, he suggests that his buy-out of various other Lincoln shareholders might not have been a legal injury if it had corrected the FHLBB acting in concert charges. If that were the case, this lawsuit also would not have arisen. But his attempts to correct the harm were not successful, this lawsuit arose and his suggestion must fail because he, himself, admitted he purchased the other shareholder's stock to remedy the acting in concert violation allegedly caused by a deficiently prepared change of control application.

Further, his suggestion does not comport with *Atkins v. Crosland,* which holds:

> If the act is of itself not unlawful ... and plaintiff sues to recover damages subsequently accruing from, and consequent on, the act, the cause of action accrues, and *the statute begins to run, when, and only when, the damages are sustained*; and this is true although at the time

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[3] Prior to 1980, Supreme Court Rule 19, now Rule 10, recognized as a reason for granting certiorari the case when a court of appeals "decided an important state or territorial question in a way in conflict with applicable state or territorial law . . . ." *See* Rule 19(b) of the 1970 Rules and Rule 38(5) of the 1939 Rules (as cited in J. Moore, *supra* at ¶ 810.01 *et. seq.*). As noted by Professor Moore, the elimination of this ground in 1980 does not mean such reason is precluded from review but, instead, probably signals that the former provisions had served their time.

> the act is done it is apparent the injury will inevitably result. (emphasis added).

Id. at 153. As found by the Court of Appeals, Beeson admitted that, in 1986, he sought to correct the FHLBB's acting in concert charges lodged against him by purchasing the stock of various co-investors listed on his change of control application filed with the FHLBB. This was legally significant evidence Petitioner sustained damage resulting from the Law Firm's alleged negligent work on his 1984 change of control application.

Moreover, as mentioned before, and although not applied by the Court of Appeals, Petitioner's knowledge of the alleged negligently prepared change of control application, both at the time of the FHLBB's acting in concert charges in 1985 and by the time of his buy-out of others acting in concert in 1986, under Texas jurisprudence, bars him from disclaiming the accrual of his legal injury. *Sutherland,* 759 S.W.2d at 946 (legal injury rule does not apply when client is previously aware of the facts for which he later sues); *Arabian Shield Development Co. v. Hunt*, 808 S.W.2d 577, 583 (Tex. Ct. App. 1991) (accrual of the cause of action "does not await the plaintiff's recognition that he has grounds for a lawsuit"); *Clade v. Larsen,* 838 S.W.2d 277 (Tex. Ct. App. 1992) (remedial actions do not toll limitations and client cannot rely on later problems resulting from original act to "push back" the accrual date of the limitations statutes) (*Citing Tennessee Gas Transmission Co. v. Fromme,* 269 S.W.2d 336, 337 (Tex. 1954)) (limitations runs from time of wrongful act and bars suits for damages resulting therefrom though damages not fully developed during limitations period).

Finally, the mere failure of the Court of Appeals to apply either a precisely application, or Petitioner's

interpretation, of Texas limitations law is not, under Rule 10, a departure from the accepted or usual course of proceedings. It is well-established this exercise of the Supreme Court's power "refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the federal judicial process." Frankfurter, *supra* at 274. *See, also, Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (reversing district court's remand order where sole reason given by district court for remand was overburdened docket); *Hickman v. Taylor*, 329 U.S. 495 (1947) (defining scope of evidentiary protection to be given attorney work product in discovery process); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (correcting lower courts' holdings on constitutional questions before reaching statutory issues).

3. The Fifth Circuit Is In The Best Position To Determine Texas Law.

That Petitioner disagrees with the Fifth Circuit's decision is of no consequence. This Court has said many times "the courts of appeals, vis-à-vis the Supreme Court, should be the final arbiters of state law." *Id.* at ¶ 810.24-1[3] *(Citing Huddleston v. Dwyer*, 322 U.S. 232 (1944)). This court is not in the business of interpreting state jurisprudence. As stated succinctly by Justice Frankfurter:

> This is not to say that the correct decision of such cases is not important; it is only to say that the importance is of a different quality. The Supreme Court cannot undertake to see that every case in a federal court is decided as a state court would have decided it.

Frankfurter and Hart, supra, at 269-270 (discussing former Rule 38(5)(b)). Moreover, it has been observed that, if "a conflict between the decision of the Court of Appeals and 'applicable state or territorial law' would support a petition for a writ of certiorari, how did one determine what the law was?" J. Moore, *supra* at ¶ 810.25-1[3]. This observation applies forcefully to this petition. Petitioner fails to illuminate how the Court of Appeals differs from Texas law and why his petition for writ of certiorari is a matter of public importance. In light of the rule that the learned judges of the circuit courts are accorded much deference in applying the laws of their circuit, it is clear Petitioner desires a second hearing. The jurisdiction of certiorari was not conferred upon this Court "merely to give the defeated party ... another hearing." Taft, C.J. in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

4. PETITIONER'S "METAPHYSICAL" SUGGESTIONS DO NOT CHANGE THE LEGAL CONSEQUENCE OF HIS LEGAL INJURY.

By now it is clear Petitioner cannot "cast" this petition as an issue over "no summary judgment evidence" on which he had no burden. In federal practice, as contrasted with state practice, a non-movant may not "lay behind the log" of legal insufficiency. D. HITTNER, FEDERAL CIVIL PROCEDURE BEFORE TRIAL 5TH CIRCUIT EDITION, 14.142-45 (Rutter Group 1991). While state limitations is a matter of substantive law, the manner in which it is established is one of procedure for which federal law applies. *Resolution Trust Corp. v. Boyar, Norton & Blair*, 796 F.Supp. 1010, 1014 (S.D. Tex. 1992) (*Citing J. M. Blythe Motor Lines Corp. v. Blalock*, 310 F.2d 77,78 (5th Cir. 1962)).

Here, pursuant to federal procedural law, Petitioner failed to raise the existence of a material fact regarding the tolling of the Texas statute of limitations. *McLaren v. Imperial Cas. and Indem. Co.*, 767 F.Supp. 1364, 1378 (N.D. Tex. 1991). Nor could he have done so. Under Texas and federal summary judgment standards, his admission he bought-out other Lincoln shareholders to remedy the acting in control charges lodged against him was taken as true. He cannot now revoke his admission to advance the metaphysical hypothesis his purchase of such stock "could have been" a mere business opportunity with no nexus to the allegedly deficient change of control application. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (1986) (non-movant must do more than show metaphysical doubt, when record cannot lead rational trier to find for non-movant, there is no genuine issue for trial). Petitioner's "metaphysical" argument ignores both his pleading and the legally dispositive evidence.

Finally, and importantly, it is well-settled that reviewing courts interpret the consequences to be given the undisputed facts surrounding a plaintiff's claim. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 472 (1984). In this instance, both the district court and the Court of Appeals determined, from the undisputed facts, the legal consequence of limitations upon Petitioner's claim. The application of the statute of limitations, under the Texas legal injury rule, was a legal determination. *Moreno*, 787 S.W.2d at 351 (*Citing Fernandi v. Strully*, 34 N.J. 434, 173 A.2d 277, 235 (1961)); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988); *Seibert v. General Motors Corp*, 853 S.W.2d 773 (Tex. Ct. App. 1993). Both the federal and state courts are filled with litigants who dispute the legal determination made on their case facts. *See Sutherland v. Caballero*, 759 S.W.2d 945, 946 (Tex. 1988) (where plaintiff stated

discontent over attorney's work when performed, it is not necessary to decide if cause accrued at time of later alleged discovery); *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528 (9th Cir. 1985) (affirming summary judgment on limitations, although plaintiff urged recent notice of condition where facts demonstrated reasonable person must have known of condition prior in time); *see also Tyler v. Vickery*, 517 F.2d 1089, 1094 (5th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976). The instant situation is no different.

CONCLUSION

This is a simple negligence case between nondiverse Texas citizens under Texas law. Although Petitioner disagrees with the Court of Appeals' decision, he fails in this portion of the case involving the Law Firm to present a question of such public importance to warrant this Honorable Court's consideration. The Court of Appeals, which is in the best position to determine local law, properly determined Petitioner is time-barred under Texas jurisprudence. The undisputed facts and Petitioner's own admissions, taken as true on summary judgment, establish the legal consequence Petitioner filed a stale claim. That he can advance metaphysical doubts contrary to his pleading and the evidence does not change such consequence.

For all these reasons, this Honorable Court should sever this portion of the Petitioner's case and deny the petition for writ of certiorari as to the Law Firm.

Respectfully submitted,

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